- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of UTAH POWER & LIGHT COMPANY, PC/UP&L MERGING CORP. (To be renamed Pacificorp) for an Order Authorizing the Merger of Utah Power & Light Company and Pacificorp into PC/UP&L Merging Corp. and Authorizing the Issuance of Securities, Adoption of Tariffs, and Transfer of Certificates of Public Convenience and Necessity and Authorities in Connection Therewith	**CASE NO. 87-035-27** BRIEF OF THE DIVISION OF PUBLIC UTILITIES

INTRODUCTION

On October 30, 1987, the Public Service Commission of Utah ("Commission") granted the motion of Utah Power & Light Co./Pacificorp ("UP&L") to file a posthearing brief defining the term "public interest" and analyzing the standard the Commission should adopt in considering the approval of this merger. At the prehearing conference on October 19, 1987, the Division of Public Utilities ("Division") urged the Commission to adopt the broadest standard possible in reviewing the proposed merger. The Division urged the Commission to adopt the so-called "positive benefits" test instead of the "no adverse impact" or "no detriment" test. The Division urged that the "positive benefits" test be adopted for two major reasons: First, the Commission had already previously adopted the "positive benefits" test in a prior decision. Second, a merger such as is being proposed in this

ase, raises many new major risks that are not currently present with UP&L. This merger raises many unquantifiable detriments to the ratepayers which will not easily be quantified in a balancing test between the benefits and the detriments of a merger. In order to take into account these detriments, the Division urged that the burden of showing positive benefits of a merger be placed on the applicants so that all concerned can be confident that the merger is in the best interest of the public. At the prehearing conference, the Division also filed a "General Statement of Issues". In that statement, the Division included as only one of the issues the question of whether Pacificorp is "ready, willing and able" to serve. The Division urged tha the scope of this proceeding should not be so narrowly defined.

The distinction between a "no adverse impact" and a "positive benefit" test is only of consequence if an equal balance can be struck between the factors being weighed in considering the merger. The Division believes that striking a so-called equal balance would be difficult if not impossible considering the factors being balanced are not between quantifiable values, but between a mix of both qualitative and quantitative values. [1] There would be a false sense of security in believing that a regulatory agency in balancing these various factors could ever be objectively summed up to a zero. The significance of the distinction between these tests, therefore, must lie in either their effect on the scope of the inquiry by

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[1] In addition, differing weight would be placed on differning factors as to their relative importance.

the Commission or on the burden of proof laid upon the applicant for a change. In essence, since the parties seeking change in the status quo ask the Commission to increase risk by switching from a set of known facts to a situation containing many unknowable risks, the burden of persuasion should be on the applicant to show that these unknown risks are outweighed by positive benefits.

At both the prehearing conference and in the posthearing brief of the applicant, an attempt is being made to limit as much as possible the definition of "public interst" and to narrowly define the burden of persuasion being placed upon the applicant. This brief by the Division will respond to both the narrow definition placed on "public interest" and and to the standard of approval to be established by the Commission.

BURDEN OF PROOF

It is basically undisputed that the burden of persuading the Commission that the proposed merger is in the public interest rests squarely on the applicant. However, it is useful to review exactly what that burden is. In Utah Department of Business Regulation v. Public Service Commission, 614 P.2d 1242 (1980), the Utah Supreme Court stated:

> In the regulation of public utilities by governmental authority, a fundamental principle is: the burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the Commission, the Commission's staff or any interested party or protestant; to prove the contrary. A utility has the burden of proof to demonstrate its proposed increase in rates and charges is just and reasonable. The company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate

> increase is insufficient to sustain the burden. Rate making is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief. A State regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to know, and before it can act advisedly must be informed of all relevant facts. Otherwise, the hands of the regulatory body could be tied in such fashion it could not effectively determine whether a proposed rate was justified. (614 P.2d 1242 at 1245-1246.)

Although this case does not provide us with much insight as to whether or not a positive benefits test or a no adverse impact test is appropriate, it does clearly state that the burden of proof rests heavily upon the public utility requesting action of the Commission. Requiring the utility to show that there is no adverse impact from the proposed merger rather than asking the utility to demonstrate that the merger has positive benefits is a much less restrictive burden being placed on the applicant.

STATUTES INVOLVED

In is posthearing brief, the applicant ("P.2") restricted the definition of public interest, and in addition, stated to the extent that a statute authorized the Commission to approve a merger, § 54-4-28 limits the Commission approval of such a merger to "after an investigation and hearing and findings that such proposed merger . . . is in the public interest." Although § 54-4-28 is clearly the section that most applies to a merger, other sections are relevant in considering approval of this application. A mere look at the title of this case assists the Commission in such a determination. The applicants are looking for "an order authorizing the merger of UP&L and

Pacificorp, and authorizing the issuance of securities, adoption of tariffs and transfer of certificates of public convenience and necessity. Such a request obviously brings into play other sections of the statute including § 54-4-31 (issuing securities only on consent of Commission), § 54-4-25 (certificate of convenience and necessity), § 54-3-1, 2 and 3 (changes in tariffs, rules or regulations, and § 54-4-1 (general authority of the Commission to conduct investigations).

In addition to "in the public interest", these sections bring forth such regulatory standards as "just and reasonable" and "convenience and necessity". Therefore, in addition to making findings that the merger is "in the public interest", the Commission will also make findings that the merger is "just and reasonable" and that the convenience and necessity of the public

ill be enhanced by such a merger.[2/3]

STANDARD OF REVIEW FOR DEFINING "TECHNICAL"

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[2] Bridger Valley Electric Assn. v. Public Service Commission of Wyoming, 430 P.2d 910 (1967), addresses the applicability of other sections in the statute in a transfer of assets or operating rights from one utility to another. In Bridger Valley, the court stated "As the Commission well points out, more is involved in the security authorization here sought than would properly fall under the permissive entitlements of §§ 37-65 and 37-66 . . . as previously noted, Bridger requested the Commission to transfer and assign to Ute that portion of the certificate of convenience and necessity granted to it pertinent to the operation and maintenance of the facilities to be transferred, and Ute also asked the Commission's authorization and transfer of that portion of Bridger's certificate. This properly required a compliance with the basic statutes relating to certification in which it is elementary that public convenience and necessity is the touchstone, the burden of proof resting, of course, with the applicant." (430 P.2d 919 at 921)

[3] Although not all of the criteria required for certificates may be required, "In the Matter of the Application of Central Utah Gas Co. for a Certificate of Convenience and Necessity" 83-091-01, December 13, 1984, the Commission outlined the criteria to be used in issuing a certificate of convenience and necessity. In that decision, the Commission outlined the following factors to be taken into account in issuing a certificate of convenience and necessity:

"1. Whether there is a need, demand, or necessity by the general public for the proposed service . . . in the respective areas sought to be certificated . . .

2. Whether the proposed service . . . is economically feasible, financially sound, efficient, stable, and continuing.

3. Whether (applicant) is physically and financially capable of providing the service proposed.

4. Whether the effect of granting the certificate to (applicant) would be detrimental to . . . existing suppliers.

5. Whether (applicant has) established a ratio of debt capital to equity which renders (it) . . . financially stable and whether the financing proposed by (applicant) . . . is in the public interest.

6. Whether the public interest and welfare of the general public in the state of Utah and the public convenience and necessity required the (proposed service) . . ."

SCOPE OF REVIEW AND STATUTORY CONSTRUCTION

In the CP National case, the Commission indicated that "the law in Utah is not entirely clear as to which standard should apply to the public interest in utility regulation." (Re: CP National Corporation, 43 PUR 4th 315 at 325.) In light of some of the decisions cited by the applicant, a question arises as to what discretion the Commission has in defining "the public interest". In addition, what deference would be given to the Commission by a reviewing court in determining the appropriate standard to be applied in this case.

First, it is a general rule of statutory construction that a liberal construction should be given to statutes designed for the advancement of public welfare, or affecting the general public welfare, or public policy of a state, or having for their end the promotion of an important and beneficial public objects. (73 Am Jur 2d Statutes, § 281.) Second, standards such as "reasonable", "necessary", "public convenience and necessity" are not precise standards and need to be read in light of the purposes to be achieved by the entire Public Utility Act. In White River Shale Oil v. PSC, 700 P.2d 1088 (1985), the Utah Supreme Court stated:

> It is undisputed that the PSC has been charged with the responsibility of regulating utilities in the public interest and that it has the necessary expertise to do so. Broad standards such as "reasonable", "unnecessary", and "public convenience and necessity" have been held to be sufficient as standards even though incapable of precise definition. "Public interest" certainly falls within this class of standards and, when read in light of the entire Public Utilities Act, is not so broad as to result in an improper delegation of authority. (700 P.2d 1088 at 1092.)

In Illinois Power Co. v. Illinois Commerce Commission, 490 N.E.d 1255 (1986), the Illinois Supreme Court was asked to interpret the Illinois statute dealing with mergers. In that decision, the Illinois court stated:

> In this case, courts have given great weight and deference to the interpretation of an ambiguous statute by a public agency charged with the administration and enforcement of the statute. Those interpretations, while not binding on courts, are considered an informed source in ascertaining the legislative intent because of the agency's experience and expertise. The legislature, apparently recognizing that it would be impractical to attempt to provide precise criteria to be considered in every transaction regulated under Section 27, gave the Commission broad discretion to decide whether a proposed transaction should be approved when it set public convenience as the standard for approval . . . a common understanding of convenience is "a favorable or advantageous condition, state, or circumstances." (490 N.E.d 1255 at 1257-58.)

In Utah, similar deference has been given to the Commission's interpretation of statutes. In Utah Department of Administrative Services v. Public Service Commission, 638 P.2d

1 (1983),[4] the Utah Supreme Court would give the Commission's interpretation of statutes great weight, but would still subject its decision to review to determine whether or not it falls within the limit of "reasonableness and rationality". The court stated, in defining what standard would be used in reviewing Commission interpretation of its statutes, stated:

> Also among these intermediate issues are these Commission's decisions on what can be called questions of "special law". The are the Commission's interpretations of the operative provisions of the statutory law it is empowered to administer, especially those generalized terms that bespeak a legislative intent to delegate their interpretation to the responsible agency. In reviewing agency decisions of this type, we apply what we have called "time honored rule of law . . . that the construction of statutes by governmental agencies charged with the administration should be given considerable weight . . ." An agency interpretation of key provisions of that statute it is empowered to administer is often inseparable from its application of the rules of law to the basic facts discussed above. In reviewing the decisions such as these, a court

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[4] In Administrative Services (Wexpro II), the court handed down its seminal decision on scope of review. In that decision, the court set up three tests for review. The first test relates to pure questions of law, such as due process and constitutional issues. In that test called the "correction of error test" the court would give the Commission no deference. The second test relates to findings of fact by the Commission. under that test, the court will upset a Commission decision on facts only if that decision is arbitrarily or capricious. The court defines arbitrary and capricious as "so without foundation in fact that they must be considered capricious and arbitrary." The court recognized that this standard is less substantial that the "substantial evidence test" applied in federal agencies. The Third test that would be applied in this case relates to questions of mixed law and fact and interpretations of statutessuch as is occurring here. Under this test, the court will give deference to the Commission, but would review its decision for reasonableness and rationality. If the Commission presents a reasonable and rational definition of public interest, the court's review will be at an end. (638 P.2d 601 at 607-612.)

> should afford great deference to the technical expertise or more extensive expertise of the responsible agency. (658 P.2d 601 at 610.)

In defining what the test of rationality is, the Court stated:

> The test of rationality may be simply a matter of logic or completeness, such as when the question is whether the Commission's findings of fact support its conclusions. Similarly, the Commission's selection of a particular course of action as a means toward achieving a known policy goal can be examined for rationality.

Finally, the Court acknowledged that "consideration of policy are primarily the responsibility of the Commission. It is well settled that this Court cannot substitute its judgment for that of the Commission . . ." (658 P.2d 601 at 611.)

The conclusion that can be drawn from these cases is that the Commission is not bound to define "public interest" in the ways cited by the applicant in Pacific Power & Light Co. v. FPC, 111 P.2d 1014 (1940) and other cases so defining public interest in a similar manner. The choice of definition chosen by the Commission in this case will be subject to the standards of review as set forth above and must have a basis in resonableness and rationality. The Division believes it has presented a rationale for adopting a more stringent standard on burden of proof than suggested by the applicant.

THE CP NATIONAL DECISION AND OTHER UTAH CASES

In the brief of the Appellant (pp. 8-9), they rely heavily on Collett v. Public Service Commission, 211 P.2d 185 (1949) as being authoritative in defining Utah law on what constitutes the public interest, and how the Commission should

define a standard in a merger case. Both CP National and in oral argument, parties pointed out that Collett is a motor carrier case. The only protestants or participants in the Collett case were competitors (211 P.2d 185, and the Supreme Court indicated that "The matter that divides the parties is really that of competition." (211 P.2d 185 at 187.) What should be recognized is that the interests to be protected in a motor carrier case are not the same as the interests to be protected in a UP&L electric merger case. This fact was recognized by the Utah legislature when it amended the Motor Carrier Act and adopting § 54-6-38. That section states that "The transfer (of certificates) shall be approved by the Commission if it finds that the carrier to whom the certificate or permit is to be transferred is fit, willing and able to provided the service authorized." This is a similar standard to that adopted in the Collett case. It is the Division's opinion that the Commission's review of the "public interest" and the standard to be applied in a merger case of fixed utilities, such as UP&L, should not be as narrow as that adopted in Collett or in the amendment to the motor carrier statutes. That the utility is "fit, willing and able," to provide service is not the only relevant issue in this merger case.[5]

Other Utah cases are not as restrictive as Collett. In Committee of Consumer Services v. Public Service Commission, 595

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[5] Review should be made of the Division's General Statement of issues in which "fit, willing and able" was only was issue to be addressed.

P.2d 871 (1979) (Wexpro I), the duty of a public utility is described in much broader terms than Collett. The Supreme Court stated:

> First, it is the duty of a public utility corporation to operate in such a manner as to give to the consumers the most favorable rate reasonably possible. This duty stems from the fact that the State has conferred on the utility of the exclusive right to sell and distribute gas. As a consequence, the utility bears a trust relationship to its customers and must conduct its operations on that basis and not as though it were engaged in a private enterprise with no restrictions as to its income. (595 P.2d 871 at 874.)

In a case involving two competing applicants for a service area, the Supreme Court held that "the Commission must take into account not only the advantage it would be to an applicant such as plaintiff to enlarge its operation, but its higher duty to appraise all of the aspects of the public as stated above, including which proposal gives the best prospect for the institution and maintenance of an efficient, stable, continuous and economical service." (Utah Gas Service Co. v. Mt. Fuel Supply Co., 422 P.2d 530 at 533 (1967).

Motor carrier cases in Utah also have recognized the duty of the Commission to look at the broad, overall public interest and to review the public interest in terms of public welfare and good. In Utah Light and Tractor Co. v. Public Service Commission, 118 P.2d 683, in a certificate proceeding, the Supreme Court stated:

> The determination of the Commission involve questions of license or privilege between the sovereign people and the individual who seeks to obtain or enjoy or privilege in the common good. The welfare of the public is the

> paramount issue. These rights are given and regulated to protect the people generally and to ensure an opportunity for all individuals, and each community, to grow and develop and assure its inhabitants the most complete and abundant life possible, commensurate with with equal privileges for all others." (118 P.2d 683 at 687.)

In a proceeding denying a transfer of motor carrier authority, the Supreme Court stated in a concurring opinion that:

> It has been legislatively determined that certain service is so affected with a public interest that it is subject to regulation and control by the Public Service Commission, both as to who will possess the authority and the way the business shall be carried on. It has the responsibility of carrying out that mandate in such a manner as to best assure efficient, economical and continuous carrier services. That is the reason the sale of such a business and the transfer of an operating authority to another can properly be done only upon obtaining the approval of the Commission. If in the judgment of the Commission, there is any valid and substantial reason that it will not be in the best interest of providing the public with efficient, economical and adequate transportaion facilities, it would be consistent with its responsibility and within is prerogative to refuse to approve such a transfer. (Murphy v. Public Service Commission, 539 P.2d 367 at 370 (1975.)

It is important to understand in detemining which standard should be adopted to look at the CP National case. In that case, UP&L was attempting to obtain the old CP National service territory. Certain southwest Utah cities protested the acquisition desiring to obtain rights in the service territory for themselves. The issue as to which standard should apply in the case dealt more with the scope of "the public interest" rather than who has the burden of proof, and what that burden should be. The Commission stated:

> Applicant takes the position that the test is satisfied by proof that the purchaser is ready, willing and able to perform and that the sale will have no material effect upon the public interest. All of the parties agree that in determining the effect of the sales, the Commission may and should determine whether UP&L is ready, willing and able to assume the utility obligations of CPN giving consideration to the resources of UP&L including its financial ability, expertise, existing utility plant and power supply, and the probable effect of the sale upon rates and the quality and continuity of service in the CPN and UP&L service areas in Utah. (43 PUR 4th 315 at 324.)

After reviewing the benefits of the UP&L acquisition to UP&L and CPN, the Commission concluded: "After completing the first step and finding that the electric service to be rendered by UP&L as compared to that now being provided by CPN will result in positive benefits to the consumers in the state of Utah . . ." The Commission went forward to discuss whether or not the "no adverse impact" test or "positive benefit" test should be applied in considering the protestants' request to expand the public interest test to include service by municipalities. The Commission concluded:

> The application clearly meets the more restrictive "no adverse impact" standard utilitized in common carrier cases in this state. However, while we do not view "public interest" as simply a popularity contest, for the purpose of this case, we will not restrict our view of "public interest" to the "no adverse impact" standard and will accept the protestants' position that a broader standard should be utilized. This broader standard involves the consideration as to whether or not any positive benefits will flow to the general public as a whole as a result of our either approving or denying the application. 43 PUR 4th 315 at 326-27.

What can be educed from the above is that in the CP National case, the Commission adopted the broader "positive benefits" test as a means to expand the definition of public interest to include certain issues raised by the protestants. The Commission did not use the positive benefits tests as a standard for burden of proof. It is the Division's position that although certain issues in the CP Naitonal case are relevant to be considered in this proceeding, the adoption of the "positive benefits" test or the "no adverse impact" test does not in and of itself result in the expansion of this proceeding to cover the issues raised in the CP National case. Instead, it is the Division's position that the adoption of the "positivie benefits" tests as opposed to the "no adverse impact" test is one of burden of proof and not of scope of proceeding. As stated in our introduction, there are numerous unknown risks associated with the proposed transaction between UP&L and Pacificorp. These unknowns must be balanced against positive benefits presented by the company to show that this merger is in the best interest of the public. We do not, therefore, view the adoption of one test over another as being the basis for including issues raised with respect to municipal ownership or options to purchase as was raised in the CP National case.

OTHER STATE CASES ON MERGERS

The Division acknowledges that Pacific Power & Light Co. v. Federal Power Commission, 111 P.2d 1014 (1940) has been cited by other jurisdictions to establish a "no adverse impact" test in merger cases involving fixed utilities. First, it must

be pointed out that the Pacific Power & Light case is not controlling in Utah. Second, the language of the statute involved in the Pacific Power & Light case was that the merger must be "consistent with the public interest". The court suggested that this language does not connotate a public benefit to be derived or suggests the idea of a promotion of the public interest. The thought conveyed is merely one of compatability. Congress resorted to this language rather than to the use of the stock term "public convenience or necessity" or to such phrases as "in furtherance of", or "will promote the public interest". (111 P.2d 1014 at 1016). As stated in an early section, the Utah statute uses the term "in the public interest". In addition, the Division believes that other sections of the Utah statute come into play in approving the transactions being proposed. The Commission should not be bound by the definition placed on the Federal Power Act by this federal court. The Commission in placing its definition on terms such as "public interest", "convenience or necessity", or "just and reasonable" only needs to meet the test of reasonableness and rationality.

In denying a merger, the North Carolina Public Utility Commission rejected the no adverse impact test. It stated:

> It appears that the record, at best, possibly shows that the interest of the public served by Carolina would not be adversely affected by the proposed merger. This, however, is not the question. It must be shown by competent, material, and substantial evidence that the public convenience and necessity requires the approval of the proposed merger. We can find nothing in the evidence which tends to prove such requirement. A mere showing that the merger will not be harmful is not sufficient. (Re: Carolina Telephone and Telegraph Co., 77 PUR 3d 62 at 65-66 (1968.)

In describing its duties, the North Carolina Commission indicated that "the proposed merger involves the largest independent telephone company in North Carolina which provides telephone service for a substantial percentage of the population of the state and is certified in forty-one counties in each North Carolina. The Commission's responsibilities require its careful examination and consideration of the evidence presented as to how the interest of the public will be affected by the proposed merger. The law requries proof that the transaction proposed is required and justified by the public convenience and necessity. (77 PUR 3d at 65.)

In denying a transfer of authority in Colorado, the Colorado Commission states:

> The benefits of the transfer of the certificate of public convenience and necessity now held by Cortez to Plateau, as proposed by the applicants, would inure principally to the stockholders of Cortez without any corresponding benefit to the ratepayers of either company. That applicant failed to prove that any benefits accruing to the ratepayers of Cortez and Plateau are sufficient in size and number to offset in a comparable degree disadvantages that would accrue to the ratepayers if the transfer is authorized. (Re: Plateau Natural Gas Company, 49 PUR 3d 193 at 198.)

Finally, in City of York v. Pennsylvania Public Service Commission, 295 A.2d 825 (1972), the Pennsylvania Supreme Court specifically overruled prior decisions that adopted the no adverse impact test. In that decision, the court held:

> Section 203 of the public utility law makes it clear that certificate of public convenience approving a merger is not to granted unless the Commission is able to find affirmatively that public benefit will result from the merger.

> That section provides in pertinent part: 'A certificate of public convenience shall be granted by order of the Commission, only if and when the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, acccomodation, convenience or safety of the public . . .' Despite the unequivocal demand of the public utility law, that a utility merger is not to be approved unless the Commission is able to find that the merger will affirmatively benefit the public, this court's decision in Northern Pennsylvania Power Co., supra, adopted a different a different standard. There we held that a utility subject to the jurisdiction of the PUC has the right to sell its property and thereby affect a merger with another utility 'unless it is established, by competent evidence, that the sale will adversely affect the public in some substantial way.' We now believe that our holding in Northern Pennsylvania Power Co., supra, must be abandoned, for it is not in accordance with the intent of the legislature. Section 203 of the public utility law requires that those seeking approval of the utility merger demonstrate more than the mere absence of any adverse effect upon the public. Section 203 requires that the proponents of a merger demonstrate that the merger will affirmatively promote the "service, accomodation, convenience or safety of the public" in some substantial. (295 A.2d 825 at 828.)

In conclusion, it can be argued in both reviewing the Pacific Power & Light case and the City of York case that the statutory language that the court was interpreting is not the same as the Utah statute. Undoubtedely, these case can only aid in guiding the Commission to adopt a standard in this state. As was stated previously, a court will give deference to the Commission's interpretation of the technical language of its own statutes. In reviewing a decision of the Commission on this subject, the court will only be interested in determining whether or not the decision of the Commission is reasonable and rational.

will not feel compelled to be bound either by the Pacific Power & Light or the City of York cases.

CONCLUSION

Undoubtedly, in the course of this proceeding, the Commission will be asked to weigh numerous competing interests. Some of the interests may be adversely affected by the proposed merger, and some my be positively benfitted by the proposed merger. In addition, numerous unknowns and risks are associated with the merger that could adversely affect the ratepayers in Utah. It is desireable in weighing the various factors that the Commission reach a conclusion that the merger create a positive benefit to the ratepayers and to the state as a whole. It is the Division's view that whether or not the Commission adopts a positive benefit test or a no adverse impact test is more a question of the burden of proof placed upon the applicant. Without doubt, the applicants in this case intend to demonstrate that the merger does have positive benefits to the ratepayers in Utah. Setting that standard as the burden of proof placed on the applicant is not unreasonable.

Since the Commission will be asked to weigh many competing interests, the issue of which test is appropriate only comes into play if, after balancing the various interests, the Commission finds that the merger has no adverse impacts but also provides no positive benefits. It is unlikely that such a scenario is a valid concern. More likely, what will happen is that the Commission will find that after weighing all of the various positives and negatives associated with the merger, that

e merger produces adverse affects on the ratepayers or that the merger produces a positive benefit to ratepayers. If the Commission has found that the proposed merger does produce an adverse impact on the ratepayers, it is irrelevant for purposes of review whether or not the Commission has adopted the no adverse impact test or the positive benefits test. In addition, if the Commission finds that there are positive benefits associated with the merger for the ratepayers, it is equally irrelevant whether or not the Commission adopted the no adverse impact test or the positive benefits test. The relevancy of the test for purposes of review would only come into play if the Commission, after weighing all of the pluses and minuses associated with the merger, comes up a draw.

In adopting the positive benefits test over the no adverse impact test, the Commission is making a positive statement as to the burden of proof being place on Pacificorp and UP&L. The Division urgers the Commission to adopt the positive benefits test as a statement of burden of proof, but does not urge that the adoption of the positive benefits test be the mechanism to expand the scope of the proceeding into areas covered by the CP National case.

Finally, the Division intends, in testimony it presents to the Commission, to evaluate a methodology for decision making in this case. That methodology will attempt to weigh the gains and losses to individual groups associated with this merger. In addition, that methodology will attempt to assign weights to the various gains and losses associated with the merger to provide

the Commission with a rational framework to determine if the proposed merger will in the overall provide positive benefits to the ratepayers of the state of Utah.

DATED this 6th day of November, 1987.

MICHAEL L. GINSBERG
Assistant Attorney General
Counsel for the Division of
Public Utilities

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of November, 1987, I mailed a true and accurate copy of the foregoing BRIEF OF THE DIVISION OF PUBLIC UTILITIES, first class, postage prepaid, to the following:

Dale A. Kimball
Gary A. Dodge
Kimball, Parr, Crockett & Waddoups
185 South State, Ste. 1300
P.O. Box 11019
Salt Lake City, Utah 84147

F. Robert Reeder
Val R. Antzak
Parsons, Behle & Latimer
185 South State, Ste. 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898

Robert S. Campbell, Jr.
Gregory B. Monson
Watkiss & Campbell
310 South Main, Ste. 1200
Salt Lake City, Utah 84101

Calvin L. Rampton
Jones, Waldo, Holbrook & McDonough
1500 First Interstate Plaza
Salt Lake City, Utah 84101

L.R. Curtis, Jr.
Jones, Waldo, Holbrook & McDonough
1500 First Interstate Plaza
Salt Lake City, Utah 84101

Raymond W. Gee
Kirton, McConkie & Bushnell
330 South 300 East
Salt Lake City, Utah 84111

Donald R. Allen
John P. Williams
Duncan, Allen & Mitchell
1575 Eye Street, N.W.
Washington, D.C. 20005

F. Elgin Ward
Lynn W. Mitton
Deseret Generation & Transmission
8722 South 300 West
Sandy, Utah 84070

Robert Wall
Utah Public Power Co-op
2470 South Redwood Road
West Valley City, Utah 84119

John Morris
LeBouf, Lamb, Leiby & MacRae
136 South Main, Ste. 1000
Salt Lake City, Utah 84101

L. Christian Hauck
Colorado Ute Electric Assn.
P.O. Box 1149
Montrose, Colorado 81402

Salli Barash
Willkie, Farr & Gallagher
1 Citi Corp Center
153 East 53rd Street
New York, New York 10022

Sidney G. Baucom
Thomas W. Forsgren
Edward A. Hunter
Utah Power & Light Co.
1407 West No. Temple
Salt Lake City, Utah 84140

George M. Galloway
Stoel, Rives, Boley, Jones and Grey
900 S.W. Fifth Ave., Ste. 2300
Portland, Oregon 97204

Sandy Mooy
Assistant Attorney General
130 State Capitol
Salt Lake City, Utah 84114

James A. Holtkamp
VanCott, Bagley, Cornwall & McCarthy
P.O. Box 45340
Salt Lake City, Utah 84145

A. Wally Sandack
370 East Fifth South
Salt Lake City, Utah 84111

Michael S. Gilmore
Idaho Public Utilities Commission
Deputy Attorney General
Statehouse Mail
Boise, Idaho 83720

Stephen R. Randle
Ungricht, Randle & Dreamer
520 Boston Building
Salt Lake City, Utah 84111

Roger Cutler
Salt Lake City Attorney
324 South State
Salt Lake City, Utah 84111

Alice Ritter Burns
Cedar City Corporation
P.O. Box 249
Cedar City, Utah 84720

Chris L. Engstrom
Attorney for Washington City
90 East 200 North
P.O. Box 400
St. George, Utah

Richard W. Giauque
Gregory P. Williams
Gary F. Bendinger
Giauque, Williams, Wilcox & Bendinger
500 Kearns Building
Salt Lake City, Utah 84101

Paul T. Morris
I. Robert Wall
West Valley City
2470 South Redwood Road
West Valley City, Utah 84101

Glen J. Ellis
Dean B. Ellis
60 East 100 South, Ste. 102
Provo, Utah 84603

L. E. Rich
Secretary to Mr. Ginsberg